

DIRECTIVE 2010-97 (Reissue of SOS Directive 2010-75)

December 29, 2010

To: All County Boards of Elections, Members, Directors, and Deputy Directors

Re: Privacy of Provisional Voter and Provisional Ballot Information

This Directive provides instructions to the boards of elections concerning the privacy of personal information disclosed by voters in connection with provisional voting; specifically, whether personal information disclosed on provisional ballot envelopes is a public record or is protected from disclosure by law. This will ensure that every county board of elections treats similar information in a similar manner, and that all Ohio elections are administered fairly, consistently by the counties of this state and according to law.

Ohio Election Law

Ohio voters casting a provisional ballot pursuant to R.C. 3505.18 through 3505.183 must complete a provisional ballot envelope and affirmation statement, in addition to voting the ballot itself. The voter casting a provisional ballot must provide personal information so that the board of elections may determine:

- whether the voter is the person he or she purports to be;
- whether the voter is properly registered to vote;
- whether the voter cast his or her provisional ballot in the correct precinct;¹ and
- whether the provisional ballot should be included in the official canvass of the election.

A voter who casts a provisional ballot provides personal information on the provisional ballot affirmation (SOS Form #12-B). The voter also may supply other information for the purposes of identification and may complete the affirmation statement that includes, but is not limited to, the voter's:

¹ Pursuant to a federal court order in *Northeast Ohio Coalition for the Homeless v. Brunner*, S.D. Ohio No. 2:06-cv-896, a board of elections may not reject a provisional ballot cast by a voter who uses only the last four digits of his or her Social Security number as identification when the ballot is cast in the wrong precinct but at the correct multi-precinct polling location for reasons attributable to poll worker error. An example of poll worker error is where the provisional ballot affirmation envelope (SOS Form 12-B) contains notations indicating that a poll worker directed the voter to the wrong precinct at a polling location containing multiple precincts. Because it is a poll worker's duty to ensure that the voter is directed to the correct precinct, these notations provide objective evidence that the poll worker did not properly or to the fullest extent required carry out his or her Election Day duties. Similarly, if a board of elections finds multiple provisional ballots voted in the correct polling location but wrong precinct, it should, either in writing, with written response from poll workers, or at a public meeting of the board, question the poll workers in that polling location to determine whether they followed the board's instructions for ensuring that voters were directed to the correct precinct.

- name
- address
- date of birth
- driver's license number
- social security number (or part thereof)
- bank account or other financial information
- other residential information (e.g., utility bill)
- employment information (paycheck)
- other information that meets Ohio's identification requirements

Under federal and Ohio law, state or local elections officials must create a "free access system" for every election. Every voter whose ballot was cast provisionally may use this free access system to determine whether the provisional ballot he or she cast was counted, and if not, the reason the board disqualified the ballot. That free access system is in the form of the "Provisional Ballot Hotline" (614-466-2564), which is activated beginning November 3, 2010.

Public Records Law

Ohio's public records law defines "record" to mean any document, device or item containing information on a fixed medium that is created, received, or sent under the jurisdiction of a public office that documents the organization, functions, policies, decisions, procedures, operations, or other activities of the public office. R.C. 149.011(G). Ohio law generally provides that, upon request and subject to some exceptions, all public records must be made available for inspection promptly, and copies of public records must be made available at cost and within a reasonable time. R.C. 149.43(B).

However, not every record in the custody of a public office is a public record. R.C. 149.43(A) provides that certain types or classes of records held by government agencies and offices are not public records and thus are not subject to mandatory disclosure. Of particular interest to election officials is R.C. 149.43(A)(1)(v), which provides that records, "the release of which is prohibited by state or federal law" are not public records and are not subject to disclosure.

The provisions governing statutory construction as set forth in R.C. 1.51 provide that, if a general provision of law conflicts with a specific provision, "they shall be construed, if possible, so that effect is given to both." However, if the conflict between the provisions is irreconcilable, the specific provision prevails, "unless the general provision is the later adoption and the manifest intent is that the general provision prevail."

Both federal and state law provide for confidentiality of personal information provided by a voter that is used by a board of elections to determine whether a provisional ballot is to be counted, and this includes personal information that also is used by the voter to gain access to the board's records to determine if his or her provisional ballot was counted. For example, R.C. 3505.181(B)(5)(b) and 42 U.S.C. 15482(a)(5)(B) provide that "[t]he appropriate state or local election official shall establish and maintain reasonable procedures necessary **to protect the security, confidentiality, and integrity of personal information** collected, stored, or **otherwise used by the [provisional voter] free access system ...**" . (Emphasis added.)

R.C. 3505.181(B)(5)(b) further provides that "[a]ccess to **information about an individual ballot shall be restricted to the individual who cast the ballot ...**" (Emphasis added.) Correspondingly, 42 U.S.C. 15482(a)(5)(B) provides that "**[a]ccess to information about an individual provisional ballot shall be restricted to the individual who cast the ballot.**" (Emphasis added.)

Discussion and Application of Law

R.C. 149.43(A)(1)(v) expressly provides that records, “the release of which is prohibited by state or federal law,” are not public records. The state and federal statutes quoted above expressly prohibit disclosure, except to the voter, of certain information provided by the voter in connection with provisional voting. Moreover, R.C. 3505.181(B)(5)(b) contains a specific prohibition against disclosure which prevails over the general requirement that governmental records be disclosed to the public upon request.

Ohio’s Public Records Act and the more specific statutes governing provisional voting discussed above illustrate competing public policies. In general, Ohio public records law reflects a legislative determination that records held by public offices should be freely available to the public. On the other hand, specific legislative enactments of both the U.S. Congress and the Ohio General Assembly mandate that information about an individual provisional *ballot* is restricted to the person who cast the ballot. Personal information provided on the provisional ballot envelope and used in connection with the provisional voting free access system is not a public record, and access to the information is restricted to the individual who cast the ballot. These two legislative goals, one of free access to governmental records, and the other of protecting a provisional voter’s personal information, may be harmonized only as to the names of persons who voted provisionally and the election precincts in which they voted, because the statutory prohibition relates to information about *an individual provisional ballot*.

R.C. 3505.181(B)(5)(b) and 42 U.S.C. 15482(a)(5)(B), quoted above, expressly provide that the “confidentiality” of personal information “used by” the provisional voter free access systems must be “protected.” Confidentiality is defined as “secrecy; the state of having the dissemination of certain information restricted.” Black’s Law Dictionary Seventh Edition, 1999, p. 294. The statutes at issue also provide that “[a]ccess to information about” a particular ballot “shall be restricted to the individual who cast the ballot.”

When a voter casts a ballot provisionally, the personal information he or she provides is necessarily “used by” the provisional ballot free access system. This is so because personal information is necessary to allow election officials to implement the system (i.e., election officials must be able to identify a person attempting to use the free access system as the person who cast a specific ballot provisionally). Election officials do this by comparing information provided by the caller to information provided by the person who cast the ballot.

When a voter appears at a polling place to vote, he or she must supply not only his or her name, but also his or her address and proof of identity. Information “about an individual ballot” includes personal information supplied to authorize the casting of the ballot as well as information concerning the validity of the ballot.

The statutes thereby authorize only “the individual who cast the ballot” to access “information about an individual ballot.” **This means that only the voter who cast a ballot provisionally is entitled to ascertain whether his or her ballot was counted, and only the names of voters and the precincts in which they cast their provisional ballots is subject to public disclosure.** No other information, including whether or not that ballot was valid and counted, should be released to anyone other than to the voter who cast the provisional ballot.

I understand there exist valid public policy reasons for releasing further public information than the names of voters who cast provisional ballots and the precincts in which they cast such ballots, such as contact information for those voters and whether their ballots counted. However, I am constrained by both federal and state law as discussed in this Directive, and neither boards of elections, nor I may disregard that law.

R.C. 3505.181(B)(5)(b) and 42 U.S.C. 15482(a)(5)(B) preclude the release of personal information, except for the name and precinct of the voter, provided by a voter in connection with the provisional voting process. Personal information other than the name and precinct of the voter is entitled to confidentiality, including information as to whether a particular ballot voted provisionally was counted.

This conclusion does not prohibit the release of records maintained by boards of elections that indicate in general or collective figures the number of provisional ballots cast, the number of provisional ballots rejected, the reasons for the rejection of classes of provisional ballots, or the number of provisional ballots within those classes, or any other general or collective information, as long as those records do not associate names of voters with counting or rejection or reasons for rejection of provisional ballots in a precinct, county or this state.

Conclusion

The controlling statutes cited above establish that “personal information” provided by a voter casting a provisional ballot is exempt from Ohio’s public records law. **The names of provisional voters and the precincts in which they voted may be released, but personal information about an individual provisional ballot, including information as to whether the voter’s ballot was counted, is exempt from disclosure and must not be released** in compliance with the specific provisions of R.C. 3505.181(B)(5)(b) and 42 U.S.C. 15482(a)(5)(B).

Accordingly, only lists of the names of provisional voters and the precincts in which they cast their provisional ballots are subject to disclosure, and any other information about the voter, including whether or not his or her ballot was counted or rejected, **shall not** be disclosed, except to the individual provisional voter. However, a provisional voter may waive in writing the privacy of information protected by the law and as expressed in this Directive. In the event a board of elections receives written waivers from provisional voters within the ten days following Election Day, a board of elections shall compare the signature of the voter on such waiver with the signature of the voter in its registration records or the most recent signature obtained from the voter in a poll book to provide access to information pursuant to any waiver. Such waiver must contain the name and signature of the voter, the name and address of the individual to whom the provisional voter has authorized the board of elections to release the voter’s private information, including whether or not the voter’s provisional ballot was counted. Otherwise, the personal information discussed in this Directive must remain protected and confidential, whether requested during the ten-day period following an election or thereafter.

If you have additional questions about this Directive, please contact the elections attorney assigned to your board, at 614-466-2585.

Sincerely,

Jennifer Brunner